No. 15083

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

MERVIN MOUNCE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the Eastern District of Washington Northern Division

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WILLIAM B. BANTZ,
United States Attorney.
WILLIAM M. TUGMAN,
Assistant U. S. Attorney.

SHAW & BORDEN CO. 317574

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JURISDICTION

The statement of jurisdiction as set forth in the appellant's brief, with reference to the statutes therein indicated, is accepted as accurate.

COUNTERSTATEMENT OF THE CASE

Appellant's statement of the case appears to us to be argumentative and not entirely accurate. Accordingly, Appellee deems it necessary to submit its counterstatement of the case.

On May 3, 1955 and May 11, 1955, the United States Customs Service seized certain publications imported by the Appellant from Europe (R. 8-14). It was stipulated between the parties that all the proper procedures were followed by the United States Customs Service (R. 40). On July 22, 1955, the United States filed a libel of information against the publications in the United States District Court for the Eastern District of Washington (R. 3-7). Appellant filed his Answer August 19, 1955 (R. 17). The matter came on for trial before the Honorable Sam M. Driver, District Judge on September 27, 1955.

On October 5, 1955, Judge Driver filed his opinion holding that Plaintiff's Exhibits 1 through 27, with the exception of Exhibits 2, 3, 4, and 16 were obscene and immoral within the meaning of Section 1305(a) of Title 19 of the United States Code.

An additional hearing was held December 30, 1955, pursuant to stipulation of the parties dated September 27, 1955. (R. 135-176).

Findings of Fact and Conclusions of Law and Judgment was filed December 30, 1955. (R. 25-31).

Motion to Amend Findings, Conclusions and Judgment was filed January 9, 1956 and an order denying said motion was entered January 19, 1956. (R. 32-35).

Notice of Appeal was timely filed by Appellant February 7, 1956. (R. 35).

In the Libel of Information the government charged and at the trial sought to prove that the libeled publications were obscene and immoral in that the pictures and photographs contained in said publications would so much arouse the salacity of persons into whose hands they are liable to fall as to outweigh any artistic, scientific or other merits they may have in other persons' hands (R. 6). The District Court found that certain of the publications were obscene and immoral as contended by the government (R. 30, 27, 18-24).

The government also charged in the Libel of Information (R. 6) and sought to prove at the trial that Appellant imported said publications for the purpose of shipping them for profit by express, and without restriction on resale to the general public, to news stands throughout the United States, and the Court so found (R. 27, 22).

In his answer Appellant denied that the imported publications were obscene and immoral and denied the publications were imported for a commercial purpose (R. 15-17). At the trial Appellant sought to show that the publications were not obscene and immoral and that said publications were imported solely to propagate the Nudist movement in the United States.

Appellant reserved all constitutional objections for appeal (R. 40).

QUESTIONS INVOLVED

The principal question raised on appeal is whether or not the libeled publications are obscene and immoral as found by the Lower Court (R. 27, 30, 18-29). Involved in the issue of obscenity is whether or not the publications were imported primarily for the purpose of reselling them, without restriction, to the public at large. Appellant raises on appeal the question of whether or not 19 U.S.C. 1305(a) is violative of the First, Fifth, Ninth, and Tenth Amendments to the Constitution. Appellant also raises the question of whether Congress has the power to prohibit by legislation, importation of obscene matter.

SUMMARY OF ARGUMENT

The dominant theme and effect of the libeled magazines is obscene and indecent.

If all the magazines were only to go to nudists, we would not term them obscene. The fact is, eighty per cent were imported for resale, at a profit, to the general public. Large, full scale photographs of well developed, model type, young women, posing in the nude, consume most of the space in the magazine. Emphasis in the photographs of both males and females is on the genitalia. There has been no attempt to shade or cover these areas. The text in many of the magazines is wholly or in part in foreign language.

There is little market for magazines containing such subject matter except among nudists, the salacious or the young and impressionable. Only twenty per cent of the magazines were destined for nudists. Publications sold through news stands, without restriction, are readily available to those in whom they could arouse salacious and licentious thoughts and deeds.

The possible benefit that might obtain from distribution of the magazines to nudists, we think, is far outweighed by the likelihood that the magazines will arouse the salacity of the reader. We are not persuaded that many converts to the nudist movement

will be gained by distribution of this type of publication to the public.

We do not believe that the candor of the nation is such that wholesale distribution of magazines, obscene and indecent to most, will be countenanced even though a possible benefit will accrue to the nudist movement.

The power of Congress to regulate all incidents of foreign commerce is plenary. Police regulations designed to protect the public morals and safety are a legitimate exercise of the commerce power.

The privileges of free speech and press do not extend to distribution of obscene matter. Even if the "clear and present danger" test were applicable, wholesale importation and distribution of obscene matter would constitute such danger.

The word "obscene" is not fatally vague and indefinite within the Fifth Amendment. 19 U.S.C. 1305(a) is not violative of the Due Process Clause of the Fifth Amendment in that a clear and definite libel procedure is delineated providing for final determination by the United States District Court.

Congress, having the power to occupy the whole field of foreign commerce, has the power to legislate to protect the people of the United States from importation of matter harmful to the public welfare. The Act does not therefore, violate the Ninth and Tenth Amendments.

ARGUMENT

Answer to Appellant's Specifications of Error I, II and III

The principal question involved here is whether nudity as portrayed in 27 different magazines involving 9,666 copies renders those magazines obscene.

Nudity is not per se obscene. The word "obscene" and its synonyms do not admit of exact definition. The definition of the word "obscene" has long created a troublesome problem for the courts. Judge Learned Hand suggested in *United States v. Kennerley,* 209 Fed. 119, 121, that "the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived at herein and now." Judge Hand, however, adopted the test of obscenity laid down by Lord Cockburn in *Reg. v. Hicklin,* L.R. 3 Q.B. 36, as follows:

> "Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."

The essence of Lord Cockburn's test of obscenity has been adopted by courts in the United States in a substantial number of cases. In *United States v. Levine,*

83 F. 2d 156 (2nd Cir. 1936), the Court laid down a test of obscenity as follows:

> "The standard must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have in that reader's hands."

See also *Walker v. Popenoe,* 80 U.S. App. D.C. 129, 130, 149 F. 2d 511, 512 (1945); *Parmelee v. United States,* 72 U.S. App. D.C. 203, 113 F. 2d 729 (1940); *Besig v. United States,* 208 F. 2d 142, 146, 147 (9th Cir. 1953); *Burstein v. United States,* 178 F. 2d 665, 667 (9th Cir. 1950); *United States v. Dennett,* 39 F. 2d 564 (2nd Cir. 1930); *United States v. One Book Entitled "Ulysses",* 72 F. 2d 705 (2nd Cir. 1934).

In paragraph VI of its Libel of Information (R. 6) the government charged that the libeled publications were immoral in substantially the language of *United States v. Levine, supra.*

It is submitted that paragraph VI of the Libel of Information (R. 6) frames the principal question to be decided here. Would the pictures and photographs contained in the libeled publications so much arouse the salacity of persons into whose hands they might fall as to outweigh any artistic, scientific or other merits they might have in other persons hands?

The government submits that the libeled publications are obscene within the test of obscenity set forth above.

It was alleged in paragraph VII of the Libel of Information (R. 6) that the libeled publications were imported for the purpose of shipping them for a profit to news stands throughout the United States for resale without restriction to the general public. We submit the evidence supports the District Court's finding (R. 22, 23, 27) that a substantial portion of the libeled publications were imported for the purpose of reselling them at a profit to the general public through news stands (R. 47, 56-63, 73, 78-83, 88-90).

Since it is clear that only a limited number of the libeled publications were destined to fall in the hands of bona fide nudists, the question of whether the publications would be obscene to nudists becomes redundant. Indeed, the government will concede that the publications would not be obscene to a bona fide nudist. In view of the fact that substantial numbers of the libeled publications were imported for sale to the general public, the sole question remaining is: "Would the libeled publications arouse the salacity of persons in whose hands they might fall?" It is argued by Appellant that by making these publications available to the general public, converts to the nudist move-

ment would be gained. We doubt that a magazine whose text is either partially or wholly in a foreign language could have much meaning aside from its pictorial content to a person who reads only English.

We do not think it necessary to go into detail about the plaintiff's Exhibits 1 through 27. We think it will suffice to make a few general observations. First, the great preponderance of the pictures in the magazines are of well-developed and proportioned young women. Second, there are few pictures of family groups and activities such as one might expect to find around a nudist camp. Third, pictures are of young men and women placing particular emphasis on the mammary and pubic areas. Fourth, the pictures are large and in the main there is little attempt to shade or cover the pubic or mammary areas. Fifth, a great number of the pictures have been photographed at close range showing in detail all features of the body areas depicted. Sixth, even though much of the printed text is in a foreign language and is uniformly unobjectionable, the publications in evidence have the dominant effect and purpose of showing, not only without restraint but with emphasis, the normally private areas of nude figures of both men and women. Seventh, publications such as Modelstudier are not nudist journals. Eighth, the only purpose we can see for the sale of an item such as the bound form of "Helios" (Exhibit No. 27) is to make available to the "reader" a greater number of nude pictures un-

der one cover. Ninth, many of the exhibits were not current at the time of their importation.

We agree with the point made by Judge Driver that the libeled magazines are offensive to the "normal reasonable and prudent person of the community" (R. 21); and that if at the time of its circulation a publication offends the sense of propriety, morality and decency of such average persons, the publication is within the bar of the statute. However, we submit that the evidence in this case shows more than that the publications are offensive to a normal person. We submit that the evidence shows the main purpose (except limited sales to nudists) of importing these magazines was to pander to that section of the public whose curiosity and lust can be aroused by the photographs therein. Further, we submit that it is only among persons in whom salacious thoughts and desires can be aroused that any market for the magazines exists, if for no other reason than that the normal, prudent, reasonable person would find such magazines offensive and obscene. Certainly, no person not literate in a foreign language could derive any benefit from the text of magazines written in a foreign language, his only interest would be in the pictures.

We submit that it is a legitimate exercise of its police powers for the government to endeavor to prevent obscene matter from falling into the hands of those whose salacity may be aroused thereby to the possible detriment of the Nation or its people.

Publications of the type libeled, made available to the public at large, tend to corrupt the moral fiber of the Nation. We suggest too, that the candor of the Nation is not such as to countenance wholesale importation and distribution of matter, which, having no valid purpose, poses a present danger to the Nation and its people.

Answer to Appellant's Specification of Error IV

The authority of Congress over interstate and foreign commerce under the Commerce Clause (Art. I, Sec. 8, Clause 3) is plenary, is complete in itself and is subject to no limitations other than those which are imposed by the Constitution. *Gibbons v. Ogden,* 9 Wheat. 1. 6 L. Ed. 23 *Champion v. Ames* (Lottery Case), 188 U.S. 321, 47 L. Ed. 492, 23 S. Ct. 321. The means necessary or convenient to the exercise of the power of Congress over interstate and foreign commerce may have the quality of police regulations. *Hoke v. United States,* 227 U.S. 308, 57 L. Ed. 523, 33 S. Ct. 281, *Champion v. Ames* (Lottery Cose), *supra.*

19 U.S.C. 1305(a) is a police regulation restricting importation of obscene matter. Section 1305(a) is constitutional if it is not in conflict with other sections of the Constitution, and if the ends sought to be attained by the regulation are legitimate. *McCulloch v. Maryland,* 4 Wheat, 316, 405, 407. 4 L. Ed. 57.

The end sought to be attained by Congress through its prohibition of obscene matter is, we submit, the protection of public morals. That Congress can legislate to protect the public morals and invoke its police powers in aid thereof we think cannot be seriously questioned. *Champion v. Ames* (Lottery Case) *supra; Besig v. United States, supra; Schindler v. United States,* 221 F. 2d 743, 745 (C.A. 9, 1955).

Appellant advances the proposition that "Congress intended the Act to apply only to those restraints 'needed for the safety of the nation'" (Br. 25). Apparently Appellant takes the position that the Act applies only to importation of matter that poses a direct threat to the Federal Government, its affairs, and institutions. To support this proposition, Appellant lists a number of examples of the types of obscenity he claims are prohibited from importation (Br. 26). We have been unable to find any authority to support Appellant's contention or his examples. Appellant seems to premise his proposition on the fact that Section 1305(a) also prohibits importation of matter urging treason or insurrection. He ignores those clauses of the Act which prohibit importation of matter containing threats to take the life of, or to inflict bodily harm upon, any person in the United States. Other clauses of Section 1305(a) prohibit importation of lottery tickets and drugs or medicines to prevent conception or cause abortion. Surely, Appellant does not intend to argue that the

importation of such articles must pose a threat to the government of the United States and its institutions before the Act may be invoked. Notwithstanding, if the effect of obscene matter is to undermine the moral fiber of all or any segment of the citizens of the United States, we think it follows that such undermining does pose a threat to the Nation.

Section 1305(a) is drawn in the disjunctive. The disjunctive "or" connotes a legislative intent to take the various clauses so separated, separately. 50 Am. Jur. Statutes, Sec. 281.

The construction Appellant places on the word "obscene" is strained. Even if the rule of strict construction, applicable in criminal cases, were applied that rule "does not require that the words be so narrowed as to exclude cases that may fairly be said to be covered by them" nor is it "permissible for the Court to search for an intention that the words themselves do not suggest. *Fasulo v. United States,* 272 U.S. 620, 628, 71 L. Ed. 443, 47 S. Ct. 200; *United States v. Wiltberger,* 5 Wheat. 76, 95. 5 L. Ed. 37. The fact that such cases as *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777; *Superior Films v. Department of Education of Ohio,* 346 U.S. 587, 98 L. Ed. 329, 74 S. Ct. 286, and *Musser v. Utah,* 333 U. S. 95, 92 L. Ed. 562, 68 S. Ct. 397 have held the words "sacrilegious," "moral," "immoral," and "public morals" too indefinite to comply with due process is no

indication that "obscenity" is not sufficiently definite. *Winters v. New York,* 333 U.S. 507, 96 L. Ed. 1359, 72 S. Ct. 1002, refers to the "permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—"obscene," "lewd," "lascivious," "filthy," "indecent," or "disgusting" and recognizes that those are apt words to describe prohibited publications. See also *Burstein v. United States, supra; Besig v. United States, supra.* The *Burstyn* case, *supra* while recognizing that "sacrilegious" was too indefinite to define, said that "obscene" presented a very different question.

The citation to *Leach v. Carlile* (Br. 26), 258 U.S. 138, 141, 66 L. Ed. 511, 42 S. Ct. 227 is neither in point nor quite accurate. In *Leach,* the Court had before it the question of whether a statute giving the Postmaster General authority to issue "fraud orders" was in violation of the First Amendment. In their dissenting opinion, Justice Holmes with whom Justice Brandeis concurred, said that the First Amendment "was intended to prevent previous restraints." In the next sentence they stated: "We have not before us any question as to how far Congress may go for the safety of the Nation." Appellant cites the *Leach* case, *supra,* for the proposition that the "First Amendment to the Constitution was intended to prevent restraints except those needed for the safety of the Nation." In any event, the decision in *Leach* was concerned with the validity of a law authorizing an

administrative determination. Section 1305(a) specifically provides that the decision as to obscenity lies with the Federal District Court.

United States v. Denmark (Five Gambling Devices), 346 U.S. 441, 98 L. Ed. 179, 74 S. Ct. 190 is not in point. This case was decided on the basis that the United States had no jurisdiction over slot machines in intrastate commerce.

Answer to Appellant's Specifications of Error V and VI

a. *Congress Has the Authority to Forbid Importation of Obscene Matters Which Are Harmful to Public Morals.*

Hoke v. United States, supra; Champion v. Ames (Lottery Case), *supra; Chaplinsky v. New Hampshire,* 315 U.S. 568, 86 L. Ed. 103, 62 S. Ct. 766; *Beauharnais v. Illinois,* 343 U.S. 250, 96 L. Ed. 919, 72 S. Ct. 725; *Winters v. New York, supra; Robertson v. Baldwin,* 165 U. S. 275, 41 L. Ed. 715, 17 S. Ct. 326; *Gitlow v. New York,* 268 U.S. 652, 69 L. Ed. 1138, 45 S. Ct. 625.

b. *19 U.S.C., 1305(a) Does Not Violate the First Amendment.*

The United States Court of Appeals, Ninth Circuit, has held that the "clear and present danger" test does

not apply to police regulations in interstate commerce. *Schindler v. United States, supra.* Since the Court's ruling was not specifically extended to foreign commerce, and in spite of the fact that Appellant has not specifically raised the point, we deem it advisable to discuss the application of the doctrine to the instant case.

The main purpose of the Constitutional guarantees of freedom of speech and press were said by Mr. Justice Holmes to be "to prevent all previous restraints upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. *Patterson v. Colorado,* 205 U.S. 454, 462, 51 L. Ed. 879, 27 S. Ct. 556. This statement was later expanded and clarified by Justice Holmes as follows: "It may well be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints* * * * * * But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely starting fire in a theater and causing a panic. * * * The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent." *Schenck v. United States,* 249 U.S. 47, 51, 52, 63 L. Ed. 470, 39 S. Ct. 247.

In his concurring opinion in *Whitney v. California,* 274 U.S. 357, 373, 71 L. Ed. 1095, 47 S. Ct. 641, Justice Brandeis, with whom Justice Holmes concurred, held that the rights of free speech and free press were fundamental but were not in their nature absolute; and added that "their exercise is subject to restriction, if the particular restriction proposed is required to protect the state from destruction or from serious injury, political, economic, or moral. * * * That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled." Since the decision in *Schenck v. United States, supra,* the Courts have had the question of abridgment of the rights of speech and press and the application of clear and present danger doctrine thereto, before them many times. We do not think it will serve any useful purpose to discuss or even to cite most of the cases, because in our view the differences between the decided cases are differences in degree occasioned by the facts peculiar to each case. We do wish, however, to cite from *Dennis v. United States,* 341 U.S. 494, 95 L. Ed. 1137, 71 S. Ct. 857, one of the latest First Amendment cases. In the *Dennis* case the Court, speaking through Chief Justice Vinson, adopted Judge Learned Hand's interpretation of clear and present danger doctrine as follows. "In each case (courts) must ask whether the gravity of the evil, discounted by its improbability,

justified such invastion of free speech as is necessary to avoid the danger." *United States v. Dennis,* 183 F. 2d, 201, 212.

Though the *Dennis* case involved the constitutionality of the Smith Act it seems to us that the test proposed by Judge Hand is applicable to the instant case; and, as Chief Justice Vinson states at page 510, "it (the test) is as succinct and inclusive as any other we might devise at this time." (Material in parenthesis ours.)

If the evidence in the instant case is tested by either the "clear and present danger" test or by Judge Hand's rule, we think no violation of the First Amendment can be found.

The evil sought to be prevented by Congress was serious moral injury to the Nation and its citizens. Such injury could take the form of a disintegration of the moral fiber of the Nation or the form of moral breakdown in an individual, to the detriment of society or of its members. Exposure to the libeled publications might have the effect of furnishing the necessary spark to set off an evil result. We cannot, of course, say that an evil result will actually obtain from exposure to the libeled publications. We can say there is little or no possibility that the libeled publications would accomplish good.

Appellant testified that 80% of the libeled publications go to news stands (R. 73). The text in many of the publications is wholly or in part in a foreign language. There are no restrictions on resale. The major portion of the space in each publication is occupied by large clear pictures of nude people, primarily model type young women. Emphasis in the pictures is on the normally private areas.

The purpose, Appellant says, of selling these publications to news stands is to gain converts to the nudist movement. We do not find Appellant's argument persuasive. We fail to see how many converts to the nudist movement can be gained through public sale of foreign language publications the dominant theme of which is unrestricted display of the human body and all its parts. We are not persuaded either that Appellant realizes only the paltry profit to which he testifies (R. 89, 96).

We submit that the probable result of unrestricted news stand distribution of the publications is that many, and more likely most of the publications, will fall into the hands of individuals who have not the slightest interest in the nudist movement and who in any event would not understand the text. We think it highly probable that some of these publications will fall into the hands of the licentious and salacious. Indeed, we can see no market for a foreign language magazine containing many full blown pictures of

nudes except among the licentious, the salacious, and the curious and impressionable young.

The danger, we think, is real and apparent. The improbability that evil will result is outweighed by the gravity of the evil sought to be prevented, for we submit, that the probability of evil is far greater than the probability that exposure to the magazines will have no effect or a good effect.

Freedom of speech, one of the most valued of our liberties, does not confer license upon any person to burden society with matter that is either harmful or repugnant to the members of that society. The privilege of free speech will not extend to importation of matter harmful to public welfare or morals. *Tyomies Publishing Co. v. United States*, 211 Fed. 385 (C.A. 6) (Obscenity); *Rebhuhn v. Cahill*, 31 F. Supp. 47 (S.D. N.Y.) (Obscenity); *Harman v. United States*, 50 Fed. 921 (D. Kan.) (Obscenity); *Champion v. Ames* (Lottery Case), *supra*, (lottery tickets); *Whitney v. California, supra; Frohwerk v. United States*, 249 U.S. 204, 206, 63 L. Ed. 561, 39 S. Ct. 249. If the libeled publications are found to be obscene, "the point that the Constitutional guarantee of freedom of speech or of the printing press, is violated, is without merit." *Besig v. United States, supra.*

c. 19 U.S.C. 1305(a) Does Not Violate the Ninth and Tenth Amendments to the Constitution.

Congress alone has the power to occupy by legislation, the whole field of interstate and foreign commerce. *Champion v. Ames* (Lottery Case), *supra.* The means necessary or convenient to the exercise of the power of Congress over interstate commerce may have the quality of police regulations. *Hoke v. United States, supra.* Congress by enacting Section 1305(a), has not assumed to interfere with commerce carried on exclusively within a state. Paraphrasing *Champion v. Ames* (Lottery Case), *supra,* at page 357, it may be said that "Congress has not assumed to interfere with the completely internal affairs of any state, and has legislated only in respect of a matter which concerns the people of the United States. As a state may, for the purpose of guarding the morals of its own people, forbid all sales of obscene matter within its limits, so Congress, for the purpose of guarding against the evil effect of obscenity and to protect the commerce which concerns all states, may prohibit the importation of obscene matter into the United States."

d. *19 U.S.C. 1305(c) Does Not Violate the Fifth Amendment.*

Appellant contends that the word "obscene" is so vague and indefinite that the "requisite certainly required by the due process clause of the Fifth Amendment" is not satisfied (Br. 33).

The Courts have uniformly held that the word "obscene" is not fatally vague and indefinite. To the

contrary, the vagueness objection to obscenity has been repeatedly rejected. *Tyomies Publishing Co. v. United States, supra; Rebhuhn v. Cahill, supra; Coomer v. United States,* 213 Fed. 1, 5-6 (C.A. 8); *Magon v. United States,* 248 Fed. 201 (C.A. 9). See also *Burstein v. United States, supra; Besig v. United States, supra; Swearingen v. United States,* 161 U.S. 446, 451, 40 L. Ed. 765, 16 S. Ct. 562.

It is hard to see how the Due Process Clause of the Fifth Amendment is violated by Section 1305(a). The statute provides a definite and clear procedure for the libel of prohibited material. In addition, the statute provides that the final determination of "obscenity" shall be made by the Federal District Court, and defines the steps necessary to obtain such determination. Here is no delegation of authority to an administrative agency. The determination is for the Courts and the word "obscene" has long been held not subject to objection for indefiniteness.

CONCLUSION

We respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

WILLIAM B. BANTZ,
United States Attorney.

WILLIAM M. TUGMAN,
Assistant U. S. Attorney.